Supreme Court of the United States

OCTOBER TERM, 1935

No. 651

GUY T. HELVERING, individually and as Commissioner of Internal Revenue of the United States, *et al.*,

Petitioners,

against

JAMES WALTER CARTER, CARTER COAL COMPANY, GEORGE L. CARTER, etc., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT JAMES WALTER CARTER

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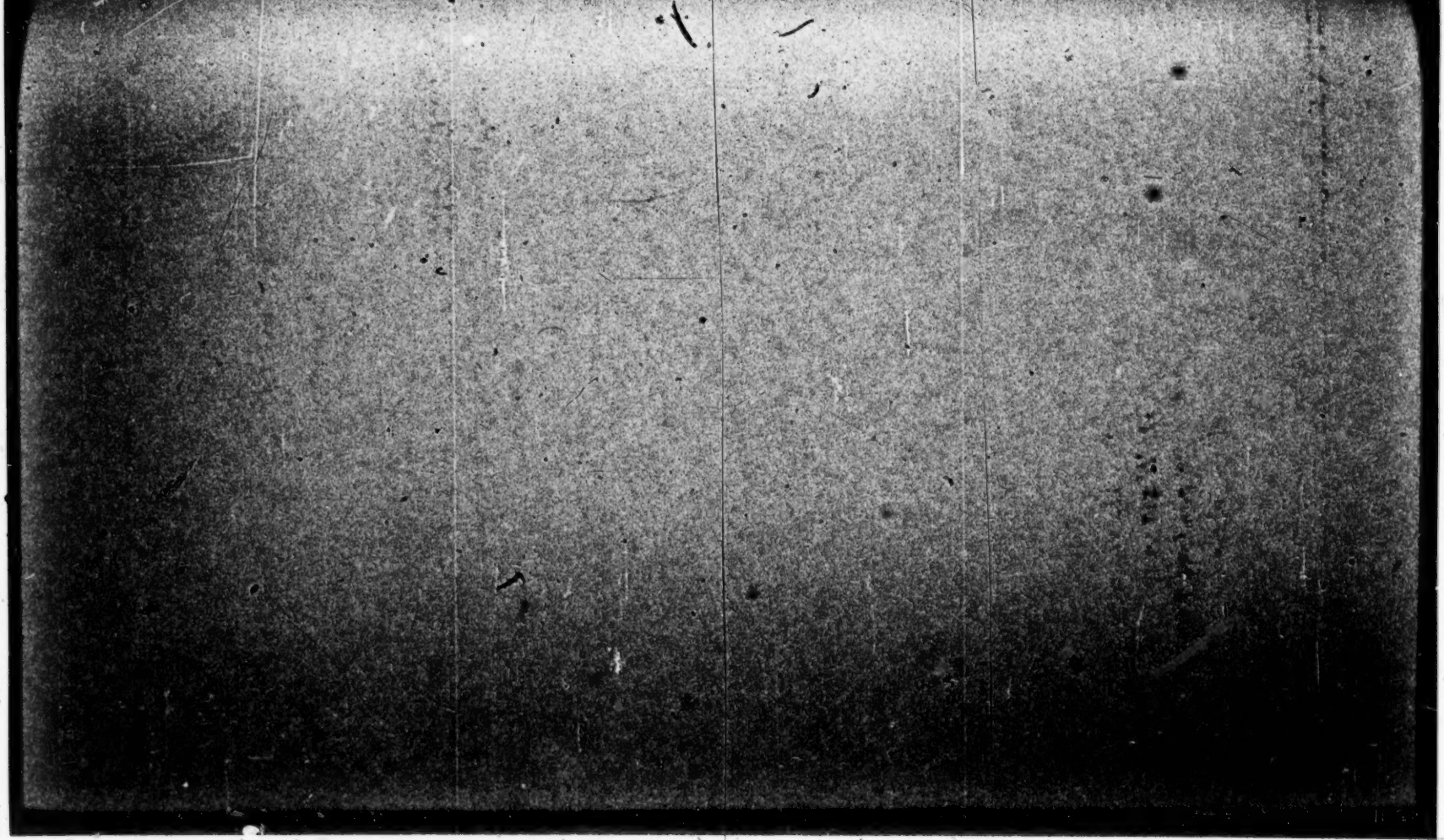

TABLE OF CONTENTS

	PAGE
STATEMENT	1
POINT I—The history of this proceeding establishes the propriety and necessity of the relief accorded by paragraph (2) of the decree of the Court below	4
1. Suit to enforce constitutional rights—Standing in equity sustained below	4
2. Government justifies the regulations by pleading jurisdictional facts. On this issue, plaintiff is entitled as a matter of constitutional right to independent judicial determination, both as to facts and as to law, on the question of constitutionality of regulatory provisions of the Act and of the Code	4
3. Plaintiff had reasonable grounds to contest the validity of the regulatory provisions, and he instituted and pressed this proceeding with all diligence	8
4. In the absence of the protection afforded by paragraph (2) of the decree of the Court below, the penalty provisions of the statute are not merely enforcement provisions, but they operate to penalize and to preclude resort to the courts for the determination and protection of constitutional rights	9
POINT II—The decisions of this Court establish the propriety and necessity of the relief accorded by paragraph (2) of the decree of the Court below	11
1. If the penalty provisions of the statute were intended by the Congress to have any application prior to final judicial determination as to the validity	

PAGE

of the regulatory provisions, the statute is to that extent unconstitutional on its face as a denial of due process 11

2. To avoid doubt as to its constitutionality, the statute should be construed as contemplating that the penalties shall commence to accrue only if and after the constitutionality of the regulatory provisions shall have been sustained in the judicial proceeding 21

3. The injunctions granted in paragraph (2) of the decree below were the appropriate remedy..... 24

POINT III—The Government's argument for reversal of paragraph (2) of the decree of the Court below, is unsound 31

CONCLUSION 42

TABLE OF CASES CITED

PAGE

Bailey v. *George*, 259 U. S. 16 ..... 27, 28

Block v. *Hirsh*, 256 U. S. 135, 154 5

Blodgett v. *Holden*, 275 U. S. 142, 148 21

Board of Trade v. *Olsen*, 262 U. S. 1 ..... 19, 29

Booth Fisheries Co. v. *Industrial Commission of Wisconsin*, 271 U. 208 40

Borden's Co. v. *Baldwin*, 293 U. S. 194, 209 ..... 5, 6

Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346 39

Burton v. *Clyne*, 258 U. S. 495 29

Carter v. *Carter Coal Co., et al.* (63 Wash. Law Reporter 986) 1, 2

Chesapeake Railway Company v. *Conley*, 230 U. S. 513 ..... 15, 17, 22

Cotting v. *Kansas City Stock Yards Co.*, 183 U. S. 79 12

Crowell v. *Benson*, 285 U. S. 22, 54 ..... 7, 21

Daniels v. *Tearney*, 102 U. S. 415 40

Davis v. *Wakelee*, 156 U. S. 680, 681 40

Ex Parte Young, 209 U. S. 123 ..... 3, 14, 17, 20, 21, 23, 29, 30, 31, 32, 34, 42

Grossjean v. *American Press Co., Inc.*, (decided Feb. 10, 1936) 40

Hill v. *Wallace*, 259 U. S. 44 ..... 19, 28, 36

Hurley v. *Commissioner of Fisheries*, 257 U. S. 223, 225 40

PAGE

Lee Moor v. *Texas and New Orleans R. R. Co.* (decided January, 1936) 27

Lucas v. *Alexander*, 279 U. S. 573, 577 21

Massachusetts v. *Mellon*, 262 U. S. 447-448 10

Missouri Pacific R. Co. v. *Boone*, 270 U. S. 466, 471, 472 21

Missouri Pacific Ry. v. *Nebraska*, 217 U. S. 196..17, 18, 19

Missouri Pacific Ry. v. *Tucker*, 230 U. S. 340...16, 17, 20

Oklahoma Operating Co. v. *Love*, 252 U. S. 331, 14, 17, 18, 25, 30

Pacific Mail S. S. Co. v. *Schmidt*, 241 U. S. 245, 16, 18, 23

Panama R. Co. v. *Johnson*, 264 U. S. 375 21

Pennsylvania v. *West Virginia*, 262 U. S. 553 36

Pierce v. *Society of Sisters*, 268 U. S. 510 36

Richmond Screw Anchor Co. v. *United States*, 275 U. S. 331, 346 21

St. Louis, I. Mt. & So. Ry. Co. v. *Williams*, 251 U. S. 63 .....15, 17, 18, 23, 24

St. Louis Malleable Casting Co. v. *Prendergast Co.*, 260 U. S. 469, 472 40

Stafford v. *Wallace*, 258 U. S. 495 .....19, 29

Tyson v. *Banton*, 273 U. S. 418, 431 5

Union Pac. R. R. Co. v. *Weld County*, 247 U. S. 282, 285 40

Wadley Southern Ry. v. *Georgia*, 235 U. S. 651, 666 .....14, 17, 18, 20, 40

Wall v. *Parrott Silver & Copper Co.*, 244 U. S. 125... 40

Wolff v. *Industrial Court*, 262 U. S. 522, 536 5

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BRIEF FOR RESPONDENT JAMES WALTER CARTER

STATEMENT

This writ of certiorari presents for consideration the Government's contention that the Supreme Court of the District of Columbia erred in entering paragraph (2) of its decree in the case of *Carter* v. *Carter Coal Co. et al.* (63 Washn. Law Reporter 986). The main controversy, which relates to the constitutionality of the "taxing" and regula-

tory provisions of the Guffey Coal Act, has been fully briefed in No. 636, *Carter* v. *Carter Coal Co. et al.*, wherein your present respondent is the petitioner. For the sake of clarity, Mr. James Walter Carter, the petitioner in No. 636, and the respondent on this certiorari, will be hereinafter referred to as the "plaintiff", and the Government officers who are respondents in No. 636 and petitioners in this case, will be referred to as the Government officer defendants.

As pointed out in plaintiff's brief in No. 636, the court below held that some of the regulatory provisions of the statute and the Code are constitutional and that, therefore, plaintiff is not entitled to permanent injunctions preventing his Company from accepting the Code and preventing the Government officer defendants from enforcing the "tax" provisions of the statute. The court accordingly, in paragraph (1) of its decree (R. 216A—216B), dismissed the plaintiff's bill of complaint. However, in paragraph (2) the Court permanently enjoined the Government officer defendants from assessing or collecting from the Company any tax or penalty imposed by the statute in excess of 1½% of the sale price at the mine on sales of its coal occurring between November 1, 1935 (the date upon which the "tax" began to accrue under the statute) and the date of the decree of the court below (R. 216B—216C). This injunction was preceded by the recital:

> "(2) The Court finds that this proceeding was brought promptly on August 31, 1935, was brought in good faith and that plaintiff had reasonable ground to contest the validity of the regulatory provisions of the statute involved; and that but for the time required by the Government officer defendants to prepare for trial the case could have been

heard and determined before November 1, 1935, the date on which the tax began to accrue, * * *" (R. 216B).

Paragraph (2) of the decree was granted upon the view that the "tax" imposed by the statute upon bituminous coal producers not assenting to and complying with the regulatory provisions of the statute and Code is in reality a penalty to compel such acceptance and compliance, and that under the doctrine established by decisions of this Court beginning with *Ex parte Young*, 209 U. S. 123, it cannot validly have applications in respect of matters occurring prior to final judicial determination as to the validity of the regulatory provisions in question.

In its brief filed in this Court jointly in No. 636 and in support of its certiorari in this case (No. 651) the Government concedes that the so-called "tax" cannot be supported as an exertion of the Federal taxing power (p. 98), since it is in reality a "penalty tax" which is "designed solely to compel compliance by the producer with the regulations" which the Government asserts are within the constitutional authority of the Congress under the Commerce Clause (p. 101). The Government further assumes that paragraph (2) of the decree below is based upon the doctrine of *Ex parte Young* (p. 284).

Plaintiff believes that this paragraph of the decree below is so clearly correct that extended comment is not justified. This brief will be confined, therefore, to a summary statement of: (1) the situation in this case justifying the relief accorded by paragraph (2) of the decree; (2) the decisions of this Court supporting the granting of such relief; and (3) the unsoundness of the contentions presented by the Government for reversal of this portion of the decree (Government brief, pp. 284-287).

POINT I

THE HISTORY OF THIS PROCEEDING ESTABLISHES THE PROPRIETY AND NECESSITY OF THE RELIEF ACCORDED BY PARAGRAPH (2) OF THE DECREE OF THE COURT BELOW.

1. Suit to enforce constitutional rights—Standing in equity sustained below.

This proceeding was brought to enforce the constitutional rights of plaintiff and of his Company against enforced submission to Federal regulation of the activities of the Company under a statute challenged as exceeding the Federal power under the Commerce Clause, as violative of the Fifth and Tenth Amendments, and as repugnant to other provisions of the Federal Constitution. The court below found that plaintiff was without any other remedy whatever in respect of his prayer for an injunction against the corporate defendants, and that he had established a standing in equity entitling him to the relief prayed against all of the defendants if his challenge to the constitutionality of the regulations were sustained (R. 213).

2. Government justifies the regulations by pleading jurisdictional facts. On this issue, plaintiff is entitled as a matter of constitutional right to independent judicial determination, both as to facts and as to law, on the question of constitutionality of regulatory provisions of the Act and of the Code.

Neither in this Court nor in the court below has the Government advanced the impossible claim that in regu-

lating such clearly intrastate activities as wages, hours and labor regulations of miners engaged in producing coal, whether or not such coal ever moves or is intended to move in interstate commerce, the statute is acting upon matters which are "in" interstate commerce or which themselves constitute interstate commerce. Both here and below the assertion has been that Federal regulation of such intrastate matters is justified since they "directly affect" interstate commerce and constitute burdens, restraints and obstructions thereto.

The declarations of Sec. 1 of the statute as to "direct effect" are, of course, relied upon by the Government; but it has not been claimed that these declarations are conclusive upon the courts, or that they operate to make the statute "invulnerable to constitutional assault". (*Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209.) Any such contention would, of course, clearly be untenable.[1]

Far from asserting that the legislative declaration in this regard is conclusive, the Government in the court below pleaded facts assumed to show the direct effect of labor relations and prices in the bituminous coal industry upon interstate commerce in such coal. In demanding more time to prepare for trial the Government informed the court below that in its view the constitutionality of the act "depends upon" the alleged existence of the burdens, dislocations, restraints and interruptions to interstate commerce as pleaded in the answer (R. 48); and in support of its claim for a full trial, with all the expense and delay thereby involved, the Government relied in the court below upon decisions of this Court which emphasize "the

[1]See *Wolff* v. *Industrial Court*, 262 U. S. 522, 536; *Block* v. *Hirsh*, 256 U. S. 135, 154; *Tyson* v. *Banton*, 273 U. S. 418, 431.

importance of adequate findings of fact in relation to controlling economic conditions" for the determination of important constitutional issues (*Borden's Co.* v. *Baldwin*, 293 U. S. at p. 211).

A lengthy trial was had;[2] and a large record, and extensive findings, have been made.

It thus appears that the plaintiff was subjected, at the instance of the Government itself, to a lengthy and extensive trial which extended for many weeks past the date when the tax began to accrue, before he was able to obtain a judicial determination as to whether the regulations of this statute can validly be imposed against his company and himself.

Moreover, to the extent that the question of direct effect upon interstate commerce of the intrastate activities involved may be a question of fact, or a mixed question of law and fact, the plaintiff himself was entitled to such full and independent judicial determination of the issues, both as to law and as to facts. The facts pleaded by the Government and to which its evidence was directed

> "are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme." (*Crowell* v. *Benson*, 285 U. S. 22, 54);

hence

> "the Federal Court may determine for itself the existence of these fundamental or jurisdictional facts" (*id.*, p. 63).

The case just cited is conclusive upon this question. The plaintiff here claimed by his bill immunity under the

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[2]The plaintiff's case was completed in one day; the length of the trial was due to the evidence introduced by the Government.

Constitution of the United States from the regulatory provisions of the statute. Assuming that a state of facts may conceivably exist which would establish that some of the activities regulated directly affect or obstruct interstate commerce, plaintiff was entitled to the independent judgment of a court of the United States upon the question as to the existence of such facts, just as a common carrier is entitled to a judicial inquiry upon the sufficiency of legislative rates, or as a vessel owner is entitled to an independent judicial inquiry upon the question of navigability or master and servant relationship, where the existence of navigability or of the master-servant relationship is a necessary predicate to the exercise of the Federal regulatory power. As this Court said in *Crowell* v. *Benson,* 285 U. S., at page 60:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to 'a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.' *Ohio Valley Water Co.* v. *Ben Avon Borough, supra.* See, also, *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 50; *Tagg Bros. & Moorehead* v. *United States, supra; Phillips* v. *Commissioner,* 283 U. S. 589, 600."[3]

[3]There was no dissent from this ruling. The dissent was on the question whether the judicial review should be upon the administrative record as to the fundamental or jurisdictional facts, or should be a trial *de novo.*

3. Plaintiff had reasonable grounds to contest the validity of the regulatory provisions, and he instituted and pressed this proceeding with all diligence.

We do not understand the Government to challenge the finding of the court below (FF. 168, R. 208, repeated in its decree R. 216B), to the effect that this proceeding was brought in good faith and that the plaintiff had reasonable grounds to contest the regulatory provisions of the statute; and further that it was brought on the day after the statute had been enacted and that it could have been tried and final decree entered prior to the date when the penalty tax began to accrue (November 1, 1935) but for the time required by the Government officer defendants to prepare for trial (*id*).

The statute was approved by the President on August 30, 1935, and the "tax", under the statute, was to commence to accrue on November 1, 1935, and was collectible on and after January 1, 1936. The action was commenced on August 31, 1935 (R. 16); the Government answered on October 2, 1935 (R. 28); plaintiff replied to the Government's affirmative defense on October 5, 1935 (R. 42) and on the same day moved to advance the case for trial commencing October 14, 1935, expressly urging that decision should be had prior to November 1, 1935 because of the penalty provisions (R. 46). The Government opposed this motion and stated that "In view of the nature of the factual issues involved, it is also evident that defendants will require until said 25th day of November, 1935 to properly and adequately prepare said case for presentation to this Honorable Court" (R. 50-51). The court advanced the case for hearing on the 28th day of

October, 1935 (R. 51) and the trial commenced on that day.

Acting, therefore, with the utmost diligence at every stage of this proceeding, plaintiff was able to commence trial only three days prior to the day upon which the penalty commenced to accrue, and was able to obtain final decree in the trial court (December 10, 1935) (R. 216A) just three weeks before the date for actual payment of the penalties (January 1, 1936).

4. In the absence of the protection afforded by paragraph (2) of the decree of the court below, the penalty provisions of the statute are not merely enforcement provisions, but they operate to penalize and to preclude resort to the courts for the determination and protection of constitutional rights.

The pecuniary penalty imposed by the Act upon producers failing to accept and comply with the code is such as promptly to drive Carter Coal Company out of business if it were subjected to it (FF 40-41, R. 128-129). If such penalty provision is applicable during the prosecution in good faith of a suit to determine the constitutional validity of the regulatory provisions of the Act, then the penalty provision is also one precluding resort to the Courts, for, as applied in this case from November 1 to the date of the argument in this Court (March 11, 1936) the penalty payable under Section 3 as a result of having brought this suit amounts to $198,000 and will, no doubt, exceed $250,000, by the date of the entry of final decree in this Court in this controversy. The effectiveness of such a penalty to make legislative and administrative action final,

however arbitrary or unconstitutional it may be, is too patent to warrant discussion.

The pendency of this suit has not, of course, prevented the accrual of the penalty. Even an injunction does not stop accrual, for, as this Court pointed out in *Massachusetts* v. *Mellon*, 262 U. S. 447-488:

> "If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

Even if the regulatory provisions of the statute are determined to be valid, the relief accorded by paragraph (2) of the decree below is imperative in order to protect the right to resort to the courts for the determination and preservation of constitutional rights. A mere temporary injunction *pendente lite* is inadequate: what is required is a permanent injunction, such as was granted in paragraph 2 of the decree below, forever enjoining the enforcement officials from assessing or collecting the penalty which accrued under the statute during the pendency of the judicial proceeding. The propriety and necessity for precisely such relief is established by the decisions of this Court discussed in Point II, *post*.

POINT II

THE DECISIONS OF THIS COURT ESTABLISH THE PROPRIETY AND NECESSITY OF THE RELIEF ACCORDED BY PARAGRAPH (2) OF THE DECREE OF THE COURT BELOW.

1. If the penalty provisions of the statute were intended by the Congress to have any application prior to final judicial determination as to the validity of the regulatory provisions, the statute is to that extent unconstitutional on its face as a denial of due process.

From what has been said, it appears:

(1) That the "tax" provision of the statute is in reality a penalty with the characteristics of regulation and punishment, to enforce submission to and compliance with the regulatory provisions;

(2) That the plaintiff is entitled to an independent judicial determination as to the validity of the regulatory provisions;

(3) That the Government has demanded and received an independent judicial investigation and determination as to the validity of the regulatory provisions, and has thereby put plaintiff to a lengthy and expensive trial; and

(4) That if the penalties which have accrued during trial are collectible for the period covered by this suit, if the regulatory provisions are valid, then plaintiff's day in court has ceased to be a constitutional right but is a privilege, to obtain which he is required to pay a quarter of a million dollars, in addition to costs.

It is the settled rule of this Court that, in such a situation, the penalties may not be made applicable, consistently with due process, for the period prior to final judicial determination of the validity of the regulation, and that a statute which provides that the penalties shall be applicable for the period of such judicial review is to that extent unconstitutional and void, without regard to the question of the validity of the regulations.

This rule, forecast in earlier decisions (see *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, at pp. 99-102), was announced and applied in the leading case of *Ex parte Young*, 209 U. S. 123, 147-148.

In that case State statutes fixed railway rates, and likewise empowered a State Commission to do so, and imposed penalties upon the carriers and their officers who should disobey the regulations by charging higher rates. The penalties consisted of a maximum fine of $5,000 for the first offense and not more than $10,000 for each subsequent offense, as well as imprisonment.

In holding that the provisions of the statute were unconstitutional insofar as they provided for enforcement of the rate regulations by making applicable penalties which precluded judicial review of the validity of the regulations, this Court said, in 209 U. S. at pages 147-148:

> "If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may

be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company, and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

"It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the

validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event.

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

The rule of *Ex parte Young* upon this fundamental point has been repeated and applied over and over again by this Court, and that ruling has come to be the head of an "unbroken line of authorities" (*Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 666).

It was stated and applied by Mr. Justice Brandeis, speaking for a unanimous court, in *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331. That was an appeal from a decree of a United States District Court denying a preliminary injunction in a suit to enjoin a State Commission from entertaining complaints against a corporation for the violation of alleged confiscatory rate orders and from doing any other act or things to enforce said orders. The Commission had made its order under authority of statutes which imposed a penalty of not exceeding $500 a day for violation of such orders, and which permitted a judicial review of the validity of the orders only after they had gone into effect, during the period of which review the

penalties accrued and might be imposed if the resort of the court was unsuccessful.

This Court reversed with directions to grant the preliminary injunction. The statutory provisions for judicial review were held inadequate because (252 U. S. at pp. 336-337)

> "the penalties, which may possibly be imposed if he pursues this course without success, are such as might well deter even the boldest and most confident. * * * Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates. *Ex parte Young,* 209 U. S. 123, 147; *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U. S. 340, 349; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 662."

Mr. Justice Hughes, referring to the rule in *Chesapeake and Ohio Railway Company* v. *Conley,* 230 U. S. 513, stated at page 521 that:

> "* * * the plaintiff in error was entitled to a fair opportunity to test the constitutional validity of the prescribed rate, and penal provisions operating to preclude such an opportunity would be invalid (*Ex parte Young,* 209 U. S. 123) * * *."

Mr. Justice Van Devanter, in *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams,* 251 U. S. 63, at pages 64-65, emphatically pointed out that:

> "* * * the imposition of severe penalties as a means of enforcing a rate, such as was prescribed

> in this instance, is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial proceeding, the validity of the rate—that is, whether it is confiscatory or otherwise—before any liability for the penalties attaches. The reasons why this is so are set forth fully and plainly in several recent decisions and need not be repeated now. *Ex parte Young,* 209 U. S. 123, 147; *Wilcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 53; *Missouri Pacific Ry Co.* v. *Nebraska,* 217 U. S. 196, 207-208; *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U. S. 340; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 659, *et seq.*"

Mr. Justice Holmes applying the rule to test the statute involved in *Pacific Mail S. S. Co.* v. *Schmidt,* 241 U. S. 245, said at page 250:

> "So that the question before us is whether we are to construe the act of Congress as imposing this penalty during a reasonable attempt to secure a revision of doubtful questions of law and fact, although its language is 'neglect * * * without sufficient cause.' The question answers itself. We are not to assume that Congress would attempt to cut off the reasonable assertion of supposed rights by devices that have had to be met by stringent measures when practiced by the States. *Ex parte Young,* 209 U. S. 123."

The rule had also been applied (opinion by Mr. Justice Van Devanter) in *Missouri Pacific Ry.* v. *Tucker,* 230 U. S. 340 to invalidate a provision of a statute which provided for the application of a pecuniary penalty in the guise of liquidated damages, deemed so onerous and oppressive

($500 per violation) as to preclude review of the validity of the rate regulation. After quoting in full the Court's language in *Ex parte Young* as set out above in this brief (230 U. S. at pp. 349-350), the opinion concludes (p. 350):

> "What was said in that case is conclusive of the question here."

And Mr. Justice Lamar, in *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, after reviewing *Ex parte Young*, *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196 and *Missouri Pacific Ry. Co.* v. *Tucker*, said at page 666:

> "In the light of this unbroken line of authorities, therefore, a statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the Commission) would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself."

The rule of *Ex parte Young* applies not only in respect of regulatory orders of administrative boards or commissions,[1] but also in cases of direct legislative commands or regulations;[2] it applies to statutes imposing pecuniary penal-

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[1] *Ex parte Young*, 209 U. S. 123; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651; and *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331.

[2] *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, involving a Nebraska statute commanding that railroads make switch connections to grain elevators; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, involving a Kansas statute fixing maximum railroad rates for the transportation of oil and gas; *Chesapeake and Ohio Railway* v. *Conley*, 230 U. S. 513, involving a West Virginia statute establishing a maximum railroad rate of 2c per mile; *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams*, 251 U. S. 63, involving an Arkansas statute

ties only,[3] as well as to those also fixing penalties involving imprisonment;[4] it has been deemed to apply where the pecuniary penalties imposed by the statute have been much lower than the penalty of $1500 a day imposed in this case;[5] and the fact that the regulation itself was not onerous in a particular case has not prevented its application.[6]

The rule has not been limited in its application to questions arising in rate litigation. It has been deemed ap-

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fixing maximum railroad rates; see also *Pacific Mail S. S. Co. v. Schmidt*, 241 U. S. 245, involving a Federal statute imposing a penalty upon owners and masters of vessels for failing to pay seamen's wages promptly.

[3]*Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340; *Chesapeake & Ohio Ry.* v. *Conley*, 230 U. S. 513; *Pacific Mail S. S. Co.* v. *Schmidt*, 241 U. S. 245; *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams*, 251 U. S. 63; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651; and *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331. These cases all involve statutes imposing a pecuniary penalty *only* for violation thereof.

[4]*Ex parte Young*, 209 U. S. 123.

[5]*Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, wherein the Nebraska statute imposed one fine of $500 for each offense in failing to make switch connections to grain elevators on demand; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, wherein the Kansas statute fixed as liquidated damages the sum of $500 recoverable by the shipper charged a rate in excess of the statutory rate; *Chesapeake & Ohio Ry.* v. *Conley*, 230 U. S. 513, wherein the West Virginia statute imposed a fine of not less than $50 nor more than $500 for each offense against the statute; *Pacific Mail S. S. Co.* v. *Schmidt*, 241 U. S. 245, wherein the Federal statute imposed a penalty of one day's pay in favor of seamen for each day's delay in paying them their wages; *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams*, 251 U. S. 63, wherein the Arkansas statute imposed a penalty of not less than $50 nor more than $300, together with the costs of suit (including a reasonable attorney's fee), payable to the aggrieved passenger, for each offense against the statute; and *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, wherein the Oklahoma statute imposed a penalty of $500 a day for each day's disobedience of an order of the Oklahoma Corporation Commission.

[6]*Pacific Mail S. S. Co.* v. *Schmidt*, 241 U. S. 245, involving a penalty for failure to make prompt payment of seamen's wages—amounting in that case to a total of but $30.33.

plicable to a statute commanding that railroads erect, equip and maintain side tracks or switches for the convenience of grain elevators adjacent to the railroad right of way (*Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196), and was relied upon in *Pacific Mail S. S. Co.* v. *Schmidt*, 241 U. S. 245 to assist this Court in construing a Federal statute, imposing a penalty upon masters or owners of vessels for failure to make prompt payment of wages to their seamen, so as not to impose the penalty during "a reasonable attempt to secure a revision of doubtful questions of law and fact" (241 U. S. at p. 250).

Moreover, by the orders which this Court entered in *Hill* v. *Wallace*, 259 U. S. 44, *Stafford* v. *Wallace*, 258 U. S. 495, and *Board of Trade* v. *Olsen*, 262 U. S. 1 (discussed pp. 28-30 *post*), this Court itself applied the rule to grant relief against the accrual of pecuniary penalties pending the determination of the validity of Federal regulatory statutes,—applying it alike where such penalties masqueraded under the guise of taxes (*Hill* v. *Wallace*), and where they were accurately denominated penalties in the statutes (*Stafford* v. *Wallace; Board of Trade* v. *Olsen*).

The rule has been applied to afford relief against penalties accruing *pendente lite* not only in cases where the regulatory provisions of the statute attacked were ultimately held invalid (*Hill* v. *Wallace; Ex Parte Young*), but in cases where such regulations were ultimately sustained (*Stafford* v. *Wallace; Board of Trade* v. *Olsen*—See discussion pp. 29-30 *post*).

In short, the rule has been applied broadly and comprehensively, wherever necessary to accomplish its purpose, *i.e.*, the preservation of the constitutional right to a day in court.

"In the light of this unbroken line of authorities" (*Wadley Southern Ry.* v. *Georgia,* 235 U. S. 651, 666), and of the varied but consistent application of the rule of *Ex parte Young,* it is apparent that had the court below refused to grant the relief accorded plaintiff by paragraph (2) of its decree, such refusal would have been based upon a failure "to recognize the real plight" of petitioner (*Missouri Pacific Ry. Co.* v. *Tucker,* 230 U. S. 340, 349), or to appreciate the purpose and scope of the rule which this Court has laid down to remedy that plight.

A plaintiff proceeding in good faith, and with reasonable grounds to challenge the validity of the regulation, is entitled to his day in court; and he cannot be penalized for insisting upon it, whether he wins or loses. Due process is not satisfied by the suggestion that the plaintiff has nothing to fear if his constitutional objections are sound and, therefore, are ultimately sustained. The same excuse, when given by the State court in *Missouri Pacific Ry. Co.* v. *Tucker* for its failure to afford relief, was held unsound by this Court. In that case the State statute provided for liquidated damages of $500 to be paid by railroad companies for every charge in excess of rates fixed by the legislature. The State statute afforded the railway company no opportunity for securing judicial determination of the validity of the legislative rates other than in a defensive way when sued for damages by a person charged a rate in excess of that fixed by the statute.

The company contended that the damages provision was a condition upon its right to judicial review which forced it to abandon the right of judicial review rather than face the condition. In accepting that view and holding the damages provision unconstitutional, this Court said, through Mr. Justice Van Devanter, at page 349:

> "The state court, although recognizing that the solution of the problem is not free from difficulty, reached the conclusion that 'so long as the defendant [the carrier] cannot be made to suffer until a competent court has passed upon the justice of the legislative rates, the guarantees of the Federal Constitution are not infringed.' *But that this view fails to recognize the real plight of the carrier is made plain by the following extract from the opinion in Ex Parte Young,* 209 U. S. 123, 147." (emphasis added.)

The opinion then quotes the language of *Ex Parte Young* (*ante*, pp. 12-14), and applies the rule of that case.

2. To avoid doubt as to its constitutionality, the statute should be construed as contemplating that the penalties shall commence to accrue only if and after the constitutionality of the regulatory provisions shall have been sustained in the judicial proceeding.

In accordance with the cardinal principle which this Court has stated to be applicable whenever the validity of an act of Congress is drawn into question, or even if a serious doubt of constitutionality is raised, this Court will first ascertain whether a construction of the statute is fairly possible by which such constitutional question may be avoided.[1]

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[1] *Panama R. Co.* v. *Johnson*, 264 U. S. 375, at p. 390; *Missouri Pacific R. Co.* v. *Boone*, 270 U. S. 466, 471, 472; *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 346; *Blodgett* v. *Holden*, 275 U. S. 142, 148; *Lucas* v. *Alexander*, 279 U. S. 573, 577; *Crowell* v. *Benson*, 285 U. S. 22, 62.

A construction of the Guffey Act as not intended to make the penalty provision applicable prior to full opportunity for judicial review as to the validity of Section 4, and of the Code promulgated thereunder, seems more than fairly possible. While the statute does set the date for the accrual of the penalties, it contains no language in terms interfering with the normal jurisdiction of courts of equity, established by many cases, to except a plaintiff from the operation of the penalty clause of a statute (where proper showing is made)[2] during the prosecution by him in good faith of a suit to determine the validity of the regulatory provisions of such statute.

A precise precedent is found in *Chesapeake and Ohio Railway* v. *Conley*, 230 U. S. 513. There the state court rule (at pp. 521-522) that

> "the penal clause of such a statute, silent on the subject of remedy, has no application, while suit is pending, in good faith, for the determination of such questions,"

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[2]As previously pointed out (pp. 2-3, *ante*), the court below has found that plaintiff was diligent and that the trial could have proceeded to final decree prior to the date when the penalties commenced to accrue but for the delays occasioned by the Government's preparation for trial. It further appears that petitioner's opportunity for trial and determination of the cause prior to the statutory date upon which the penalties became applicable was further prejudiced by administrative delay in the appointment of the Bituminous Coal Commission and in the formulation of the coal code by that Commission after its appointment. The statute was approved by the President on August 30, 1935, but the Commissioners were not appointed by him until September 20, 1935. Although the Code, as eventually formulated and promulgated by the Commission, is no more than a practically verbatim copy of Sec. 4 of the statute, which could have been formulated and promulgated the day after the Commission was appointed, the record shows that the Commission did not formulate and promulgate the Code until October 9, 1935 (R. 58), although the statute commands that "upon the appointment of the Commission it shall *at once* formulate said Code" (Act, Sec. 5 (a)).

because the Court presumed that the legislature did not intend to legislate upon the subject of judicial remedy, or to interfere with the normal authority of courts of equity. Accordingly, it held that the plaintiff there was

> "excepted from the operation of the penalty clause [of the regulatory statute] during the prosecution by it, in good faith, of a suit to determine whether said statute is confiscatory in its operation and effect, as applied to such company."

On review, this Court, in an opinion by Mr. Justice Hughes, stated at page 521 that "While the plaintiff in error was entitled to a fair opportunity to test the constitutional validity of the prescribed rate, and penal provisions operating to preclude such an opportunity would be invalid (*Ex parte Young,* 209 U. S. 123), it is clear that the provisions for penalties of the statute in question * * * are not open to this objection, in the light of the construction placed upon them by the state court."

This Court has also itself construed penalty provisions of statutes—silent, as is the penalty provision of the statute at bar, on the question of remedy against the penalty—as not intended to infringe upon the historic function of courts of equity (*St. Louis, I. Mt. & So. Ry. Co.* v. *Williams,* 251 U. S. 63, 65), stating that it did not appear that adequate opportunity was not available for the company regulated

> "by a suit in equity * * * during the pendency of which the operation of the penalty provision could have been suspended by injunction."

And in *Pacific Mail S. S. Co.* v. *Schmidt, supra,* the Court refused to construe the Federal statute there in-

volved as intending that the penalties should be applicable during good faith prosecution of a suit to determine liability under the statute. "We are not to assume", the Court there pointed out, "that Congress would attempt to cut off the reasonable assertion of supposed rights by devices that have had to be met by stringent measures when practiced by the States. *Ex parte Young*, 209 U. S. 123." (241 U. S. 245, 250).

3. The injunctions granted in paragraph (2) of the decree below were the appropriate remedy.

Whether the penalty provision of the statute be regarded as intended to be applicable during the period of plaintiff's day in court (and, therefore, unconstitutional *pro tanto*), or whether the statute be construed as not intending that the penalty provisions should be applicable during that period, it is clear that the injunctions against the Federal enforcement officials granted in paragraph (2) of the decree are the appropriate means for affording plaintiff relief against unlawful action of those officials in seeking to hold the penalty provisions applicable during the period of this suit. The propriety of injunction in order to afford the plaintiff due process in situations such as that disclosed in the case now at bar is established by ample precedent.

In *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams*, 251 U. S. 63, 65, the Court stated that the operation of the penalty provision could have been "suspended" by injunction during the pendency of an equity suit to determine the validity of the regulatory provisions of the statute. In the *Conley* case, 230 U. S. 513, the Court approved the ruling of the

court below, in an injunction proceeding, which excepted the plaintiff from the operation of the penalty clause during the prosecution of a suit in good faith to determine the validity of the regulatory provision.

In the *Oklahoma Operating Company* case, 252 U. S. 331, previously discussed herein (where the state statute did contemplate that the penalty should be applicable during the period of judicial review), it was ruled by this Court that in cases of this type it was the duty of the Federal trial court to grant a temporary injunction restraining the enforcement of the penalties,[1] to be followed upon final hearing by the entry of a permanent injunction forever restraining their enforcement for the period of the trial regardless of the ruling as to the validity of the regulatory provisions,—provided only that it appeared that the

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[1]In the instant case the court below granted a preliminary injunction preventing the Company from joining the Code upon condition that plaintiff post a bond (in the estimated amount of $1,500 per day) to cover the taxes which accrued during trial, and refused to enjoin the assessment or collection of the tax *pendente lite*. This Court, without opinion, denied certiorari to review such ruling and also denied plaintiff's application for temporary restraining order and temporary injunction (Journal, November 17, 1935; *Carter* v. *Carter Coal Co. et al.*, No. 563, October Term, 1935). In its brief in this Court in that case in opposition to such temporary relief, the Government pointed out, as had the court below, that the cause was then on trial and that it was anticipated that the trial would be terminated during the month of November and in any event long prior to the collection date (January 1, 1936). These anticipations have subsequently been confirmed by the event. The plaintiff made no claim at that time that the posting of the required bond for a short additional period was beyond his means; and the Government stated "There is no occasion for such relief at the present time, and any relief which may be granted in the future could be given in such terms as would amply protect petitioner from being required to pay the taxes which accrue during the pendency of the trial" (Government's brief, No. 563, p. 6). It is precisely such relief that the court below has provided by paragraph (2) of this final decree.

plaintiff had reasonable ground to contest the validity of such regulations.[2]

The precise instructions of this Court to the District Court in that case were as follows:

> "The plaintiff is entitled to a temporary injunction restraining the Corporation Commission from enforcing the penalties. * * * The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under present conditions, confiscatory. If they are found to be so, a permanent injunction should issue to restrain their enforcement either by means of penalties or otherwise, as through an asserton by customers of alleged rights arising out of the Commission's orders. *Missouri* v. *Chicago, Burlington & Quincy R. R.*, 241 U. S. 533, 538. If upon final hearing the maximum rates fixed should be found not to be confiscatory, a permanent injunction should, nevertheless, issue to restrain enforcement of penalties accrued *pendente lite,* provided that it also be found that the plaintiff had reasonable ground to contest them as being confiscatory" (p. 337):

This Court has established an unbroken line of precedent for itself granting injunction, in cases of this type, to afford relief against penalties accruing during the pendency of a suit to determine the validity of regulatory provisions of a statute.

In every such case which counsel have found, in which this Court was applied to on proper averments to restrain the accrual of penalties pending determination of a suit

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[2]As previously pointed out, the court in the instant case, has found that "plaintiff had reasonable grounds to contest the regulatory provisions of the statute" (FF. 168; R. 208, R. 216-B).

involving the validity of a regulation, such relief has been granted, and has been made effective by the use of an injunction.

The first and, with the exception of the instant statute, the only other Federal statutes known to counsel which attempted to impose invalid penalties in the guise of taxes, were the Child Labor Tax Statute and the Future Trading Act of 1921, both of which Acts were held unconstitutional by this Court on May 15, 1922. The *Child Labor Tax Case* arose on an action to recover taxes paid, not on a suit to enjoin the collection of the taxes; hence the question involved in this case did not arise. The explanation appears to be that the *Child Labor Tax* was not in fact ruinous or oppressive in amount, considering the circumstances of the manufacturers upon whom imposed, for it was only 10% of net profits, and the distinction between 15% or or 13½% of gross sales, on the one hand, and 10% of net profits, on the other hand, is obvious.[3] Therefore, the taxpayer in the *Child Labor Tax Case* paid and sued to recover, and the taxpayer in *Bailey* v. *George,* 259 U. S. 16 (the other Child Labor Tax Case), while suing to enjoin the collection of the penalty tax, failed to allege in his bill any facts to indicate that the penalty was oppressive in amount or to show that he would be hindered in the prosecution of his normal legal remedy by payment of the penalty. It was for failure to state any grounds whatever for equitable jurisdiction that the bill in that case was dismissed, even though the tax was recognized as a penalty.

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[3]For example, the Carter Coal Company's gross sales in 1934 were $3,918,266, and net profits $323,998, (R. 12). A 10% tax on net profits, comparable to the Child Labor tax, would be $32,400, or less than $100 a day, as contrasted with the penalty under the present statute of upwards of $1500 per day. Cf. *Lee Moor* v. *Texas and New Orleans R.R. Co.,* (decided January, 1936).

In the instant case, of course, the bill of complaint alleges ample grounds for equitable jurisdiction, and sets up abundant facts to establish that petitioner is without any remedy in a court of law (R. 11-12) and these facts were proved at the trial and found by the court below (R. 213).

With the exception of *Bailey* v. *George* (thus seen to be not in point) this Court has granted relief against penalties accruing *pendente lite* in every case of the present type which counsel have found, in which such relief has been asked.

Hill v. *Wallace*, 259 U. S. 44, arose on a stockholder's bill to enjoin the Board of Trade (of which plaintiffs were members) and its directors from accepting the Federal regulation prescribed by the Future Trading Act of 1921, and to enjoin the tax collecting and law enforcement officers of the United States from enforcing the penalty tax, which was the enforcement device of that statute just as of the statute at bar. The trial court denied injunction and dismissed the bill, and the case came to this Court on appeal prior to the time when, under the statute, the tax commenced to accrue. While the appeal was pending in this Court for argument, the Court granted an injunction to relieve plaintiffs against the penalty tax accruing pending the decision of this Court on the question of the constitutionality of the regulatory features of the Act (Journal, November 21, 1921)[4]; and subsequently, after hearing, this Court reversed the decision below and held the whole statute unconstitutional.

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[4]The form of the injunction was subsequently modified due to special circumstances applicable to that case only (see motion of Solicitor General in that case asking for a modification of the injunction); but the substituted injunction likewise afforded plaintiffs complete protection from the penalties accruing *pendente lite*. See Journal of December 12, 1921.

In two important subsequent cases involving Federal statutes regulating interstate commerce, the Court, while ultimately sustaining the validity of the regulations, nevertheless issued injunctions forever protecting plaintiffs against penalties which accrued while the validity of the regulatory provisions was in litigation in this Court. In *Stafford* v. *Wallace*, 258 U. S. 495[5], the statute provided penalties in the form of fines and forfeitures for non-compliance. The trial court sustained the statute and denied injunction. While the appeal was pending in this Court, the Attorney General stipulated, not merely that no suit should be instituted to recover any fines, forfeitures or penalties while the appeal was pending, but that no suit should be instituted to recover any fines, forfeitures or penalties under the act which the plaintiffs should incur during the period of the pendency of the appeal up to ten days after the argument of the cause in this Court. The appeal was not determined within such period, whereupon the plaintiffs, relying upon the rule of *Ex parte Young*, applied to the Chief Justice for an order extending the stipulation until final determination of the cause and for thirty days thereafter.[6] This motion was granted by the Chief Justice whose order was subsequently made an order of the Court.

Board of Trade v. *Olsen*, 262 U. S. 1, involved the constitutionality of the Grain Futures Act, which made it unlawful to deliver certain contracts in interstate commerce and provided fine and imprisonment for violation of this

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[5]Similar procedure was followed in the companion case of *Burton* v. *Clyne*, 258 U. S. 495.

[6]See motion of plaintiffs in that case in the files of this Court.

provision. The case came to this Court on appeal from a dismissal of the bill in a suit brought to enjoin the enforcement of the statute. The case was filed in this Court prior to the effective date of the enforcement provisions of the Act. This Court, on motion of counsel for the plaintiff, enjoined the District Attorney and the postmaster from enforcing the penal provision of the statute during the pendency of the appeal and for a stated period after the final decision of this Court.

In the cases referred to, the Government not only made no objection to complete suspension of the penalty provisions of the statutes pending final determination by this Court of the validity of the regulatory provisions thereof, but, recognizing the justice of the position of the plaintiffs, acquiesced in the action of the Court in granting injunctive relief of that character. In the instant case, on the other hand, the Government not only opposed this minimum measure of relief accorded the plaintiff in the court below, but now appeals to this Court to have the action of the court below reversed and the relief denied.

So far as counsel have been able to ascertain, this is the first instance in our history in which so arbitrary a position has been taken by the Government of the United States. The elementary requirements of due process in the primary sense, as announced and applied by this Court in *Ex Parte Young,* in *Oklahoma Operating Co.* v. *Love,* and in the other cases discussed herein, require that this arbitrary contention be rejected.

POINT III

THE GOVERNMENT'S ARGUMENT FOR REVERSAL OF PARAGRAPH (2) OF THE DECREE OF THE COURT BELOW, IS UNSOUND.

The Government concedes (brief, 284-287) that the doctrine of this Court, as announced in *Ex parte Young* and following cases, applies to statutes or administrative orders which subject a person to severe penalties without affording a judicial review of the statute or order "before liability for the penalties attach" (pp. 284-285). The sole reason urged by the Government why the injunction granted in paragraph (2) of the decree below should have been refused in this case is the contention that it is possible, under the special procedure provided by the present statute, to secure such judicial review before liability for such penalties attaches.

This is simply not true. The same argument was repeatedly urged in the court below, both in open court and in chambers, and the court was unable, as is the plaintiff, to understand how such a contention can seriously be urged. The argument is based upon a host of fallacies. It will be sufficient for present purposes to mention but a few.

The Government does not contend that the statutory remedy is available or applicable in respect of plaintiff's suit against his company and its officers and directors. It concedes (pp. 286-287), as the court below held (R. 213), that the plaintiff is properly in court in this equity proceeding on his prayer to enjoin the company and its officers from accepting and complying with the Code. Reliance is placed on statutory remedy only in support of the conten-

tion that the court below was not justified in granting relief in respect of penalty taxes which have accrued during the pendency of this suit,—the argument being that the *company* has a statutory remedy which it could have pursued and thereby avoided accrual of the penalties.

The contention comes to nothing more than the assertion of the admitted fact that the penalties will not accrue if the company *complies* with the regulations. But the very basis of the doctrine of *Ex parte Young* is that the person sought to be subjected to regulation cannot be penalized for insisting upon a day in court *before* compliance with the regulations. Mere joining of the Code will not relieve the Company of the penalties or entitle it to the drawback. The very section of the Act which imposes the penalty expressly conditions the right to drawback not merely upon "acceptance of the Code" but also upon acting "in compliance with the provisions of such code" (Sec. 3). No section of the Act provides that subjection of a Code Member who violates the Code to the full penalty tax must await an order of the Coal Commission expelling it from membership, or any other action bringing into play the statutory procedure for review. On the contrary, the quoted provisions of the taxing section itself make it plain that the penalty tax can be avoided only by actual compliance with the Code, and that breach thereof automatically ends the right to drawback and subjects the Code member to the full penalty.

This view, clearly the only one which gives effect to the language of section 3, is fortified by consideration of section 7, and of the regulations issued under section 3. Section 3 provides that the penalty tax shall be payable "under such regulations, and in such manner, as shall be

prescribed by the Commissioner of Internal Revenue". Section 7 makes applicable all consistent provisions of law relating to collection and disposition of internal revenue taxes, including those relating to "penalties and refunds". Among these are provisions of the Revenue laws and of the Criminal Code imposing heavy liabilities for presenting any false, fictitious or fraudulent claim against the United States, or for concealing or misrepresenting facts in connection therewith. These penalty provisions are included *in extenso* in the regulations issued by the Commissioner of Internal Revenue under Section 3 of the present act (R. 996-997). The plain purpose of this is to warn all coal producers that, in making their returns under Section 3 of this Act and the regulations, they may not safely even *claim* the drawback unless they have in fact *complied* with the provisions of the Code. Otherwise, their very act of even *claiming* the drawback will subject them to still further penalties, both pecuniary and criminal.

The "statutory remedy" is a mirage. It simply does not exist in any real or adequate sense. The code was formulated and prescribed as a "working *agreement*" (R. 58); and the drawback is allowed only to those who accept it "in such form of *agreement* as the Commission may prescribe" (Act, Sec. 3). The form prescribed recites that the operator "hereby *accepts*" the Code. That acceptance constitutes the operator a party to a *contract*, with correlative rights and duties in relation to other operators party thereto. The statute expressly provides that a breach of such contractual duties makes the Code member liable to pay treble damages to other code members injured thereby (Sec. 5(d)). The so-called "statutory remedy" provides no machinery to relieve the operator from *that* liability.

Nor does it operate to relieve the Code member from other injuries discussed at some length in plaintiffs' brief in No. 636 (pp. 274-287).

The Government's chain of argument is that, by the provisions of Section 3, acceptance of the Code and of the drawback does not preclude or estop an operator from contesting the constitutionality of any provision of the code or its validity as applicable to him; that the producer is, therefore, free to accept the Code, secure the drawback, violate the Code and continue to receive the drawback unless and until the Commission shall bring a proceeding under Section 5(b) of the statute to revoke his code membership. It is further urged that an order of the Commission revoking such membership is subject to review in the Circuit Court of Appeals and, ultimately, in this Court (Sec. 6(b)); and it is suggested that, on such judicial review of an order of the Commission revoking code membership, the court may make an appropriate order under the doctrine of *Ex parte Young* to prevent liability for the penalty from attaching because of the Code violation for any period prior to the final judicial decree in such proceeding,—even though this is expressly contrary to the language of the statute. By confession (Government brief, p. 286), the statute contemplates that this statutory relief shall be sought and had at the Code member's peril of being retroactively subjected to the full penalties from the date of his violation, if he fails to sustain his constitutional claim. This is the express provision of Section 5(c) of the statute which reads:

> "(c) Any producer whose membership in the code and whose right to a drawback on the taxes as provided under this Act has been canceled, shall

> have the right to have his membership restored upon payment by him of all taxes in full for the time during which it shall be found by the Commission that his violation of the code or of any regulation thereunder, the observance of which is required by its terms, shall have continued. In making its findings under this subsection the Commission shall state specifically (1) the period of time during which such violation continued, and (2) the amount of taxes required to be paid to bring about reinstatement as a code member."

But the Government answers this with the statement that in that statutory remedy, the courts, on review of the order of the Commission, can disregard this statutory provision and give the producer the same equitable relief to which he is entitled in an equitable proceeding such as the present one. In short, the suggestion of the Government is that the producer should refuse to avail himself of the right to equitable relief established by the decisions of this Court in this equitable proceeding; should join the Code; should refuse to obey it, and thereby invite a statutory proceeding in which he should pray the Court to accord him relief which this statute expressly provides he shall not have.[1]

Yet the Government does not urge that this statutory remedy is exclusive or that it prevents the maintenance of the present suit. It does not now urge that the present suit is premature. But when its argument against paragraph (2) of the decree below is examined it will be found to

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[1]Plaintiff fails to see the relevancy of the suggestion briefly made on page 287 of the Government's brief that relief against the invalid penalty should be denied plaintiff because his Company has advantages over Code members as long as the Company stays out of the Code.

come to this: that the present bill is premature in so far as it seeks relief against the penalties, because plaintiff might be able to persuade the court, in a subsequent statutory proceeding, to disregard the statute and give him the same equitable relief for which he now prays.

The argument is based upon a complete misconception of the rules applicable to the maturity of causes of action. It is thoroughly settled that one does not have to wait until the injury is done in order to apply for relief from a court of equity, but that he may apply for preventive relief whenever the injury apprehended is certain to occur and is reasonably imminent. *Hill* v. *Wallace,* 259 U. S. 44; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *Pierce* v. *Society of Sisters,* 268 U. S. 510. We forbear further discussion of the issue of prematurity since the Government does not in terms raise it, although that is what its argument really comes to. There can be no contention that this suit is premature when nearly a quarter of a million dollars of penalties not only have accrued but are now collectible if the protection accorded by the injunction granted below is withdrawn.

The argument has other fallacies quite as serious.

It assumes that the *plaintiff* has a statutory remedy. The court below found that he has not (R. 213), and obviously that finding is correct. On what theory does the Government suggest that the court disregard the corporate entity and assume that a stockholder who has failed to induce his corporation to refrain from joining the Code and thereby run the risk of the statutory penalties, will have any authority, after it has joined, to make it disobey the code and thereby not only run the risk of the penalties if its constitutional objections be not sustained but also

subject itself to a statutory procedure under the terms of which it is expressly provided that it shall pay the full penalty for the full period of its disobedience if its constitutional claims be rejected?

Even looking at the question from the point of view of the Company itself, the Government's argument is bottomed upon a patently inadmissible construction of the statute, for it imputes to the Congress an intention to require all coal producers to go into this Code and to promise to comply with it, and yet to do so only for the purpose of breaching it in order to be able to have a constitutional right to go to court. On this theory, it would be perfectly equitable and proper for a coal producer to join the Code with the express intention of immediately thereafter refusing to comply with it. Indeed, the immediacy of the necessity of non-compliance is established by the fact that Code members were required to report their private contracts and business to the District Board commencing on November 1, and, therefore, the protesting member might have had to commence to breach the Code on that date, and thereby *ipso facto* to become liable to the "tax" and to find himself in precisely the same position in which he would have been if he had never joined the Code.

The argument is also based, as previously pointed out, upon a clearly untenable construction of the statute, *i.e.*, upon the view that the right to a drawback continues even after a code member shall have flagrantly and openly disobeyed the code or refused to obey it altogether. The Government apparently construes Section 5 of the Act as providing that the right to drawback shall continue until the Coal Commission has made an order withdrawing code membership. Such, however, is not the language of Sec-

tion 5, nor is it the language of the taxing section (Sec. 3). The latter section does not provide that every producer who files an acceptance of the code, without more, shall be entitled to a drawback. It provides "that any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in Section 4 of this Act and *who acts in compliance with the provisions of such code,* shall be entitled to a drawback in the form of a credit * * *"

It is to be noted that different agencies administer the regulatory and the taxing provisions. The statute provides that the Commissioner of Internal Revenue and his subordinates shall administer the taxation sections (Sec 3). In this connection it is noteworthy that the regulations initially promulgated by the Commissioner of Internal Revenue under this taxing section provided that in order to be entitled to the drawback the producer must not only accept, but must comply with the Code (T. D. 4596, Art. 31; R. 992).[2] *After* the present point had been thoroughly argued in the trial court upon the application for temporary injunction, the regulation was changed to read:

> "Art. 31. *Producers entitled to credit.*—In order to be entitled to the deduction, on the return, of the credit or drawback of 90 per cent of the

[2]"Art. 31. *Producers entitled to credit*—In order to be entitled to the credit or drawback of 90 per cent. of the amount of his tax as provided by section 3 of the Act, a producer must comply with the following conditions: First, file with the National Bituminous Coal Commission his acceptance of the code; second, act in compliance with the provisions of the code; third, show code membership during the taxable period for which the return is made and compliance in the manner required by Form 1 (Coal). See article 51. No credit or drawback is allowable with respect to coal sold or disposed of prior to the date of filing with the commission acceptance of the code" (Regulations, Art. 51; R. 992).

amount of the tax, as provided by section 3 of the Act, a producer must have been a member of the bituminous coal code (see article 32) during the taxable period for which the return is made. See article 51. No credit or drawback is allowable with respect to coal sold or disposed of prior to the date of filing with the commission acceptance of the code." (Regulations; R. 1000.)

It must be remembered that the tax collecting officers of the United States are under a statutory duty to collect taxes, and that such taxes can be collected by distraint without the necessity of any judicial proceedings (26 U. S. C. Secs. 1580-1583, 1600-1601, *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346). The regulations, of course, are not conclusive upon the construction of the statute; and neither the plaintiff nor the Company would have any assurance that if the Company should join the code and then refuse to comply with it the full tax would not immediately be collected from it irrespective of the Coal Commission action, or that, if this court were ultimately called upon to construe the statute upon this point, it would not hold that failure to comply with the code subjected the member to the full tax, without more.

Still another objection to the Government's argument is the question whether acceptance of the Code estops the producer from contesting the provisions of the *Act* not contained in the Code itself, as, *e. g.*, the tax. The statute provides only that acceptance of the Code and of the drawback shall not estop the producer from contesting the validity of any provision of the *Code* (Sec. 3). The regulations issued by the Coal Commission and the form of acceptance promulgated by it depart from the statute and provide that

acceptance shall not estop contest of the validity either of the Act or of the Code (R. 804). However, such regulations cannot broaden the statutory intent, and it is at least doubtful whether a Code member is entitled to contest the validity of any of the enforcement provisions of the Act such as Sec. 5(c) with respect to retroactive penalties (which is not a part of the Code), if he accepts the code.[3]

It is a thoroughly established doctrine that a remedy which is not certain is not adequate. *Davis* v. *Wakelee*, 156 U. S. 680, 688; *Union Pac. R. R. Co.* v. *Weld County*, 247 U. S. 282, 285; *Grossjean* v. *American Press Co., Inc.* (decided Feb. 10, 1936).

We submit that it is thoroughly clear that the statutory remedy, to which the Government refers as the sole defense to the injunction granted in paragraph 2 of the decree below, is not available at all to the plaintiff; is wholly inadequate; and is most uncertain as to the scope of relief which can be afforded therein. In any event, the statute does not provide, and the Government does not contend, that such remedy shall be exclusive.

The procedure resorted to by petitioner in the present case is not only appropriate; it is necessary. In *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, where the railroad company had a right to resort to equity (as this plaintiff has done), and then did not avail itself of the right, the Court said, at page 669:

> "If the Wadley Southern Railroad Company had availed itself of that right and—with reasonable

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[3]See *Daniels* v. *Tearney*, 102 U. S. 415; *St. Louis Malleable Casting Co.* v. *Prendergast Co.*, 260 U. S. 469, 472; *Hurley* v. *Commission of Fisheries*, 257 U. S. 223, 225; *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407; *Pierce Oil Corporation* v. *Phoenix Refining Co.*, 259 U. S. 125; *Booth Fisheries Co.* v. *Industrial Commission of Wisconsin*, 271 U. S. 208.

promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order —though not so in respect of violations prior to such adjudication.

"But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful."

The very point is that the Wadley Southern lost its right because it had had the right to come into equity and had failed to do so. The reason that it was required to pay the penalty was precisely because it had not gone into equity to enjoin it. In the instant case, plaintiff has the right to come into equity and secure the relief accorded him by paragraph (2) of the decree below. As pointed out above, and as held by the court below (R. 213), he has no remedy of any kind in any other tribunal. As to the Company, the Government's argument is that it should join the Code, then refuse to comply with it, and wait to be proceeded against by the Coal Commission for such violations. It was just such a course of conduct which lost the Wadley Southern any right to relief against the penalties in the case cited.

CONCLUSION

To reverse that portion of the decree below granting an injunction outlawing the penalties accrued during the period of judicial review would be not only to cause irreparable injury to the plaintiff, but would strike at a great and fundamental principle relating to the supreme function of the Federal judiciary in maintaining the doctrine of the enumeration of Congressional powers. By making judicial review so hazardous as to leave the citizen no choice but to comply with Congressional regulations of his conduct, it would operate to make the Congress the sole and exclusive judge of its own powers. The penalty device to prevent resort to the courts is one of the most familiar practices of a despotic government, which this Court, as we have shown, has repeatedly struck down.

It is respectfully submitted that paragraph (2) of the decree below is correct, and that the doctrine of *Ex parte Young* is applicable to this controversy up to the date of the final decree of this Court.

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